IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

O R D E R

S.B.CIVIL MISC. APPLICATION NO. 48/2002
(Smt. Sukh Sunder Devi Vs. Saraswati)

Date of Order : 22nd November, 2006

PRESENT

HON'BLE MR. JUSTICE H.R.PANWAR

Mr. R.K.Thanvi for the petitioner-respondent.
Mr. N.M.Lodha for the non-petitioner-appellant.

BY THE COURT:-

By the instant application under Order 41 Rule 21 of the Code of Civil Procedure, 1908 (for short 'the CPC' hereinafter), the petitioner-respondent seeks recalling of the judgment dated 19.4.2002 passed by this Court in Civil Misc. Appeal No. 122/1994 (Smt. Sukh Sunder Devi Vs. Smt. Saraswati Devi and another), whereby the appeal filed by non-petitioner-appellant Smt. Sukh Sunder Devi against petitioner-respondent Smt. Saraswati Devi, was allowed and the judgment and decree of the lower appellate court dated 22.4.1993 was set aside and the decree of the trial court was restored.

I have heard learned counsel for the parties.

Carefully gone through the record.

The petitioner-respondent has filed the instant application seeking to recall the judgment of this Court dated 19.4.2002 on the ground that notice of appeal before this Court have not been served on her. However, learned counsel for the petitioner-respondent does not press this ground for the reason that there had been sufficient service of notice of appeal.

Order 41 Rule 21 CPC deals with rehearing on application of respondent against whom ex parte decree made and provides that where an appeal is heard ex-parte and judgment is pronounced against the respondent, he may apply to the Appellate Court to re-hear the appeal, and, if he satisfies the Court that the notice was not duly served or that he was prevented by sufficient cause from appearing when the appeal was called on for hearing, the Court shall re-hear the appeal on such terms as to costs or otherwise as it thinks fit to impose upon him.

Learned counsel for the petitioner-respondent submits that though he has filed an application under Order 41 Rule 21 CPC r/w Section 151 CPC, but he submits that his application may be treated as an application under Section 152 CPC. He has relied on a decision of Hon'ble Supreme Court in Lakshmi Ram Bhuyan Vs. Hari Prasad Bhuyan and Others AIR 2003 SC 351 and submits that under Section 152 CPC, clerical or

arithmetical mistakes in judgments, decrees or orders or errors arising therein from any accidental slip or omission could be corrected at any time by the Court either on its own motion or on the application of any of the parties.

Section 152 CPC reads as under :-

> "152. Amendment of judgments, decrees or orders.- Clerical or arithmetical mistakes in judgments, decrees or orders or errors arising therein from any accidental slip or omission may at any time be corrected by the Court either of its own motion or on the application of any of the parties."

Learned counsel for the petitioner-respondent submits that the trial court decreed the suit filed by the non-petitioner-appellant Sukh Sunder Devi vide judgment and decree dated 25.8.1990, and a decree of eviction was passed against the petitioner-respondent. The judgment and decree of the trial court was challenged by the petitioner-respondent before the Additional District Judge No.2, Jodhpur (for short 'the lower appellate court' hereinafter) being Civil Appeal Decree No.41/93. I have carefully gone through the judgment and decree of the lower appellate court dated 22.2.1993. The only argument was advanced by the appellant therein, as to whether the sub-tenant is necessary party and in absence of impleading the sub-tenant as necessary party, can the judgment and decree of the trial court sustain. The lower appellate court allowed the appeal

holding therein that the sub-tenant is necessary party and therefore, the appeal was accepted on preliminary point by setting aside the judgment and decree of the trial court and the matter was remanded to the trial court to implead Marudhara Sanitary Traders so called sub-tenant as party-defendant and decide the matter afresh. That judgment and decree of the lower appellate court came to be challenged before this Court. This Court relying on a decision of Hon'ble Supreme Court in Biswantah Poddar Vs. Archana Poddar and another, AIR 2001 SC 2849 held that it is unnecessary for the landlord to implead the sub-tenant when he seeks to evict the original tenant on the ground of unlawful tenancy. Hon'ble Supreme Court while considering the scope of Section 14 of the West Bengal Premises Tenancy Act (12 of 1956) held that for creation of sub-tenancy requirement of previous consent of landlord as also notice in writing to landlord by tenant and sub-tenant is mandatory. Sub-tenancy created without previous consent of the landlord and without notice to landlord becomes opposed to Section 14 of the Act to the eviction suit. It was further held by their Lordships that if a sub-tenancy created contrary to the provisions of Section 14 of the Act, then, as could be seen from Section 13 (2) of the Act, it becomes unnecessary for the landlord to implead the sub-tenant when he seeks to evict the original tenant on the ground of unlawful tenancy.

Learned counsel for the petitioner-respondent does not dispute the proposition laid down by Hon'ble Supreme Court and submits that the ground taken in lower appellate court regarding non-impleadment of the sub-tenant does not survive in view of the decision of Hon'ble Supreme Court.

The only argument raised by learned counsel for the petitioner-respondent is that before the lower appellate court in memo of appeal he has raised all grounds apart from the ground of non-impleadment of sub-tenant in the suit filed by plaintiff-landlord and lower appellate court decided the appeal only on the ground i.e. as to whether sub-tenant is necessary party or not and therefore, the other grounds on which the petitioner-respondent filed the appeal have neither been argued nor decided and therefore, while allowing the appeal filed by plaintiff-landlord Sukh Sunder Devi, the matter was required to be remitted to the lower appellate court to decide the appeal filed by petitioner-respondent against the judgment and decree of the trial court to be heard afresh on the ground other than that of impleadment of sub-tenant and according to learned counsel omission in the judgment of this Court dated 19.4.2002 could be corrected by invoking the provision of Section 152 CPC.

In Lakshmi Ram Bhuyan Vs. Hari Prasad Bhuyan and Others (supra), Hon'ble Supreme Court held that Section 152 enables the Court to vary its judgment so as to give effect to its

meaning and intention. The order of the trial court drawing up the decree is set aside. The parties are allowed liberty of moving the High Court under Section 152 CPC seeking appropriate rectification in the judgment of the High Court so as to clearly specify the extent and manner of reliefs to which in the opinion of the High Court the successful party was found entitled consistently with the intention expressed in the judgment.

Learned counsel appearing for the non-petitioner appellant has relied on a decision of Hon'ble Supreme Court in State Bank of India Vs. Ram Chandra Dubey and Others (2001) 1 SCC 73 wherein Hon'ble Supreme Court held that relief claimed but not granted, should be deemed to have been denied and on the strength of this decision, learned counsel for the non-petitioner-appellant contended that the grounds raised other than the ground of sub-tenant being necessary party have neither been argued by the counsel before the lower appellate court nor the lower appellate court has decided and therefore, it must be deemed to have given up by the petitioner-respondent before the lower appellate court or deemed to have been rejected and therefore, it cannot be agitated by the instant application.

On careful perusal of the material available on record and more particularly the judgment of the lower appellate court, it no where appears that the appellant therein who is petitioner

herein, has raised any other ground other than the ground of non-impleadment of sub-tenant and therefore, it cannot be inferred from the judgment of the lower appellate court that the petitioner-appellant argued the appeal on all the ground taken in the memo of appeal and therefore, having unsuccessful before this Court on the point of sub-tenant being necessary party, the petitioner seeks to re-argue the appeal before the lower appellate court on the other grounds taken in the memo of appeal. In my view, this cannot be considered to be an omission in the judgment of this Court warranting interference in exercise of power under Section 152 CPC. In this view of the matter, I do not find any clerical or arithmetical mistake or any accidental slip or omission in the judgment of this Court dated 19.4.2002.

Consequently, the civil misc. application has no force and it is therefore, dismissed. The interim order dated 04.10.2002 stands vacated and stay petition also stands dismissed.

(H.R.PANWAR),J.

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